

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

RICHARDS V. RICHARDS

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LISA A. RICHARDS, APPELLEE AND CROSS-APPELLANT,
V.
BRADLEY J. RICHARDS, APPELLANT AND CROSS-APPELLEE.

Filed May 1, 2012. No. A-11-317.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge.
Affirmed as modified.

John A. Kinney and Jill M. Mason, of Kinney Law, P.C., L.L.O., for appellant.

Paul J. Gardner and Kevin J. McCoy, of Smith, Gardner, Slusky, Lazer, Pohren &
Rogers, L.L.P., for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

Bradley J. Richards appeals from the decree entered by the district court for Douglas County that dissolved his marriage to Lisa A. Richards. Bradley challenges the calculation of his child support obligation and related expenses, the determination of alimony, and certain provisions in the division of the marital estate. In Lisa's cross-appeal, she assigns error to the denial of her request for attorney fees. Because we find no abuse of discretion in the district court's resolution of these issues, we affirm as modified to clarify the provision regarding childcare expenses.

BACKGROUND

Bradley and Lisa were married in Grand Island, Nebraska, in September 1993 and lived in Omaha, Nebraska, at the time of trial. Three minor children were born to the parties.

Lisa filed a complaint for dissolution of marriage on May 19, 2009; the parties separated in June; and Lisa established a separate residence. In a temporary order, the district court awarded the parties joint legal and physical custody of the children, and ordered Bradley to pay temporary alimony and child support of \$1,200 and \$1,436 per month, respectively, commencing on August 1.

The parties entered into a parenting plan in which they agreed to joint legal and physical custody of the children, with roughly equal amounts of parenting time for each party. The parties were unable to agree on the division of the marital assets, the calculation of Bradley's income for purposes of determining his child support obligation, the amount and duration of alimony, and attorney fees. A trial was held on these issues on November 22 and December 15, 2010.

Bradley has a bachelor's degree in business administration. At the time of the marriage, Bradley was working for ConAgra in Saginaw, Michigan. The family resided in Michigan for 1½ years before Bradley was relocated to Hastings, Minnesota. Six months later, Bradley was again relocated to Kansas City, Missouri, where the family lived for 6 years. Then, the parties moved to Omaha. Bradley worked as a commodities broker for three different companies in Omaha during the 3 years prior to trial.

The record shows that Bradley earned \$209,705 in 2005; \$161,369 in 2006; \$186,239 in 2007; \$224,086 in 2008; and \$164,600 in 2009. Bradley's 2008 income included a bonus that he earned from the prior fiscal year as well as a severance payment of \$40,000 when Bradley left his job. Bradley's 2009 income was for 11 months of employment.

In July 2010, Bradley began working at Great Plains Renewable Energy buying corn for ethanol facilities. Bradley's contract provided for a starting base salary of \$150,000 per year. The contract also contained a "short-term incentive program" indicating that his bonus target will be 30 percent of base salary; however, the actual bonus he receives may be less or more than the target, depending on company and individual performance. For the 2010 bonus, the contract provided that, in the event the company pays bonuses for 2010, Bradley would receive a minimum of \$40,000. Bradley was also granted stock options, retirement benefits, and insurance through the company. At the time of trial, Bradley was paying for a health and dental plan through his employment for Lisa and the children.

Lisa testified that during the marriage, it was her responsibility to handle the finances and pay the bills. In the last several years of the marriage, Bradley always received an annual bonus or a severance payment in lieu of a bonus from his employment. Lisa testified that they relied upon Bradley's bonuses. Lisa would deposit the bonus income into savings and then "dip" into it monthly to meet their expenses. On the other hand, Bradley testified that while the bonuses were "important" to their lifestyle, he did not believe that they relied upon the bonuses as income. Bradley testified that there were no guaranteed bonuses. Bonuses were based upon company and individual performance, and Bradley "hoped" he would receive that bonus.

Thomas Pauldine, the vice president of human resources for Great Plains Renewable Energy, testified that bonuses are not guaranteed and that "things can change right up until the very, very end." Although Bradley's contract provided that in the event the company paid bonuses for 2010, he would receive a minimum of \$40,000, there was no assurance as to what the amount of any future bonuses would be. Pauldine clarified that there was no expectation or

guarantee for a bonus, but that employees “have a hope” that it will be paid. In the past 2 years, bonuses were paid out, but not to all employees.

Lisa has a college degree in human development and family relations with a minor in special education. When the family lived in Michigan, Lisa finished her degree and worked at a retail store. She was unable to find work when the family moved to Minnesota due to the short duration they lived there and the high cost of childcare. When the family moved to Kansas City, Lisa worked full time for a local YMCA then switched to part time when they decided to expand their family. The record shows that Lisa earned \$2,900 in 2007 and \$19,505 in 2009.

At the time of trial, Lisa was 39 years old and was working full time at a local community college, earning \$27,000 per year. Lisa had also invested in a small business co-op with her sister; however, at the time of trial, they were liquidating their interests in this business with the hope of paying off their debt. There was no evidence presented that Lisa earned any significant income from this business venture. Lisa testified that she had looked into going back to school to get her teaching certificate and had also considered pursuing additional education to become a school psychologist or school counselor. Lisa had not yet applied to return to school at the time of trial.

Lisa estimated that her current expenses total \$6,000 per month. Lisa’s rent is \$1,500 per month, and she also has to pay for utilities. Her cellular telephone bill, including the children’s plans, is \$107 per month. Lisa also has a car lease payment and credit card bills. To meet her expenses during the separation, Lisa used credit cards and “dipped” into savings. Lisa’s total postseparation credit card debt was nearly \$13,000. Lisa requested alimony of \$3,000 to \$3,500 per month.

Bradley submitted a detailed list of his monthly expenses, excluding the temporary alimony and child support, which totaled \$6,913.10. This exhibit showed that the monthly mortgage payments, including the first and second mortgages, were approximately \$2,000. Despite his higher income, Bradley also accrued postseparation personal debt. At the time of trial, Bradley owed approximately \$14,000 for credit card indebtedness. His list of monthly expenses included approximately \$1,000 for this debt service.

Bradley received a \$35,000 bonus, or net amount of \$24,992, from his previous employer in December 2009, after the parties’ separation. Bradley did not give Lisa any portion of this bonus directly. Bradley testified that he used this bonus to pay off prior years’ debt, his living expenses, his temporary child support and alimony obligation, his life insurance premium, and his son’s car insurance. However, Bradley did not indicate how much was spent on each of these items and he did not submit any documentation to support these expenditures. The remainder, \$2,500, is in Bradley’s Omaha State Bank savings account.

During the marriage, Lisa received inheritances from her grandparents’ estates as well as gifts from her father, totaling approximately \$40,000. These funds were all put into an Omaha State Bank savings account in Lisa’s name only. Lisa used money from the account occasionally to assist the family, but she testified that she always replenished the account to maintain a balance of approximately \$40,000. Lisa also put money from Bradley’s bonuses into this account. The balance of the account at the time of separation was \$34,730. Lisa claimed that this account should be considered her nonmarital property.

During the separation, Lisa purchased a 2004 Suzuki vehicle for \$4,600, which money she withdrew from her Omaha State Bank savings account. Lisa subsequently leased a Toyota Camry, trading in the Suzuki for \$2,300, a portion of which she used to license the leased vehicle. The remainder was returned to the savings account.

Lisa submitted evidence regarding the legal fees she incurred from the two different attorneys she had throughout the proceedings. Lisa testified that but for the actions of Bradley, she thought that her legal fees would have been less. Lisa incurred \$21,151.50 in legal fees from May 15 through November 30, 2010. She also incurred \$9,551 with her prior attorney.

The district court entered a decree of dissolution on March 17, 2011. The parties' parenting plan was approved and incorporated into the decree. The court utilized the joint custody child support calculation worksheets, setting Bradley's child support at \$1,473 for three children; \$1,314 for two children; and \$935 for one child. We note that the oldest child was born in 1992 and would soon be emancipated after the decree was entered. The calculation worksheets used gross monthly income for Bradley of \$15,883 and for Lisa of \$2,250. The decree required Bradley to pay 84 percent and Lisa to pay 16 percent of unreimbursed medical expenses after the initial \$480 each year and used the same percentages in determining the parties' obligation for all childcare expenses incurred by Lisa as a result of her employment and/or schooling. The court ordered Bradley to pay alimony to Lisa in the amount of \$3,000 per month for 72 months or until the remarriage of Lisa or the death of either party. The court ordered that each party should pay their own attorney fees.

With regard to property division, the court awarded to Bradley the marital real estate, subject to the first and second mortgages, the 2005 Chevrolet Suburban, and the 2003 Jayco RV, subject to the existing indebtedness. The court determined that the net amount of Bradley's 2009 bonus should be included in the marital estate and that Lisa's savings account should be considered marital property and included in the marital estate. The court awarded each party the household goods and personal property in their respective possession (with the exception of some enumerated items that had not yet been exchanged) and ordered that each party should pay his or her own postseparation debt. The retirement and investment accounts were divided equally between the parties. In order to equalize the division of assets, Bradley was ordered to pay Lisa the sum of \$11,278 within 30 days of the signing of the decree.

Bradley filed a motion for new trial and/or motion to alter or amend the decree, which motion was overruled, and he timely filed this appeal.

ASSIGNMENTS OF ERROR

Bradley asserts, consolidated and restated, that the district court abused its discretion in (1) calculating his child support obligation and each party's contribution to medical and childcare expenses, (2) awarding alimony, (3) including Bradley's 2009 bonus in the marital estate, and (4) failing to consider the 2004 Suzuki in its division of property. On cross-appeal, Lisa asserts that the district court abused its discretion in failing to award attorney fees to her.

STANDARD OF REVIEW

In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and

attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009).

An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2009).

ANALYSIS

Child Support and Related Issues.

Bradley's assignment of error centers around the district court's calculation of his income for the purposes of determining child support and his respective percentage obligation of unreimbursed medical and childcare expenses. When calculating child support, the district court set Bradley's total monthly income as \$15,883, which equates to \$190,596 annually. Bradley contends that his child support obligation should be calculated using only his current base salary, or \$150,000. Bradley claims that it was error to include his 2010 bonus as it was not guaranteed.

The Nebraska Child Support Guidelines define "total monthly income" as income of both parties derived from all sources. Neb. Ct. R. § 4-204. The Nebraska Supreme Court has recognized the necessity of taking a flexible approach in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature. See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). Thus, all income from employment must be included in the initial calculation, which then becomes a rebuttable presumption of appropriate support. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

The Nebraska Supreme Court has previously determined that regularly earned overtime wages and other forms of income should be included in income for purposes of calculating child support. *Noonan, supra*; *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991). The Supreme Court has also indicated, however, that the level of income should not be based on income that is "speculative in nature and over which the employee has little or no control." *Stuczynski*, 238 Neb. at 374, 471 N.W.2d at 126. If the moving party shows the nonmoving party earns or can reasonably expect to earn a certain amount of income on a regular basis, a rebuttable presumption of including such income arises under the Nebraska Child Support Guidelines. *Stuczynski, supra*.

After the moving party has met its burden of proof, the nonmoving party must produce sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order before deviation from the guidelines is appropriate. See, Neb. Rev. Stat. § 42-364.16 (Reissue 2008); *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

In this case, the evidence showed that Bradley was currently earning a base salary of \$150,000 annually and that if his employer paid bonuses for 2010, Bradley would receive a minimum bonus of \$40,000. Although these bonuses were not guaranteed, in the past 2 years the company had paid bonuses to at least some of its employees. Despite working for several companies in different states throughout the marriage, Bradley received an annual bonus, or a severance payment in lieu of a bonus, in addition to his salary for at least the last 4 or 5 years

prior to trial. The record shows that this bonus income had become a regular part of Bradley's income and was relied upon by the family to meet their living expenses. Further, Bradley's average total annual income for the 5 years preceding trial, excluding 2010, was approximately \$189,000.

We find no abuse of discretion in the district court's determination of Bradley's income for purposes of calculating his child support and obligation toward the unreimbursed medical and childcare expenses. The "support of one's children is a fundamental obligation which takes precedence over almost everything else." *Gangwish*, 267 Neb. at 913, 678 N.W.2d at 515.

Bradley also argues that the trial court should have ordered Lisa to contribute to the childcare expenses incurred when the children are in Bradley's possession. The district court's order provided that "[a]ll child care expenses incurred by [Lisa] as a result of [Lisa's] employment and/or schooling shall be paid 16% by [Lisa] and 84% by [Bradley]." Bradley argues that because the parties share joint custody, the district court abused its discretion in failing to order the parties to mutually contribute to any childcare expenses incurred due to the employment or education of Lisa *or* Bradley.

The Nebraska Child Support Guidelines provide that childcare expenses "due to employment of either parent or to allow the parent to obtain training or education necessary to obtain a job or enhance earning potential, shall be allocated to the obligor parent as determined by the court." Neb. Ct. R. § 4-214.

Although the practical result of the order entered by the district court is the same, we modify the decree's language to comport with the guidelines to provide that childcare expenses due to the employment of either parent or to allow the parent to obtain training or education necessary to obtain a job or enhance earning potential, shall be paid 16 percent by Lisa and 84 percent by Bradley.

Alimony.

The district court ordered Bradley to pay Lisa alimony in the amount of \$3,000 per month for 72 months. Bradley does not dispute that alimony should be awarded but asserts that the alimony award is excessive.

Neb. Rev. Stat. § 42-365 (Reissue 2008) provides in part:

When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

In addition to the specific criteria listed in § 42-365, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). However, disparity in income or potential income may partially justify an award of alimony. *Hosack v. Hosack*, 267

Neb. 934, 678 N.W.2d 746 (2004). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

The parties were married for almost 16 years. At the time of trial, Lisa was 39 years old and in good health. She has a college degree and is employed full time. However, due to the frequent moves required for the advancement of Bradley's career, Lisa often stayed home in order to care for the children or worked flexible, part-time jobs. Although Lisa testified that she was interested in pursuing further education to obtain her teaching certificate and possibly to become a school psychologist or school counselor, she presented no concrete plans to do so. Lisa's current earnings of \$27,000, when compared to Bradley's current base salary of \$150,000, are nominal, even excluding his potential 2010 bonus income of \$40,000. Bradley was 42 years old at the time of trial and had earned an average yearly income of close to \$190,000 over the previous 5 years.

Bradley challenges Lisa's stated monthly expenses and her failure to document them. He essentially argues that Lisa has failed to prove that she needs alimony, at least in the amount ordered by the court. Lisa testified that her monthly expenses total \$6,000, including \$1,500 for rent and \$107 for cellular telephones for her and the children. She also testified that she has utility expenses, a car lease payment, and credit card bills. Although Lisa did not offer an exhibit detailing all of her monthly expenses, Bradley did not specifically challenge her testimony at trial. Lisa's net monthly income is \$1,860, far short of her stated monthly expenses. Considering that Bradley's monthly expenses are approximately \$6,900, which includes \$2,000 toward the mortgage payments, we cannot say that Lisa's monthly expenses are unreasonable.

In reviewing the award of alimony in the case at hand, we are mindful that an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Sitz, supra*. After considering all of the factors involved in an award of alimony and the particular facts of this case, we cannot say that the district court abused its discretion.

Treatment of Bradley's 2009 Bonus.

Bradley argues that the trial court erred in including his 2009 bonus as a marital asset in the division of property between the parties. Bradley first claims that this amounts to an "erroneous 'double dip'" by treating the bonus as an asset, yet including his bonus income for purposes of setting child support and awarding alimony. Brief for appellant at 17. We disagree. The \$35,000 bonus at issue was paid to Bradley in December 2009, after the August temporary order of child support and alimony and nearly a year prior to the trial. Lisa received no portion of this bonus. The temporary alimony awarded to Lisa was significantly less than the alimony awarded in the decree. As such, it does not appear from the record that Bradley's 2009 bonus income was factored in to determining the temporary support and alimony. Further, the calculation of Bradley's current income or earning capacity for future support is a separate and distinct issue from the division of the 2009 bonus as an asset. We conclude that treatment of the 2009 bonus as a marital asset did not amount to "double dipping."

Bradley also argues that the 2009 bonus no longer existed at the time of trial and that the district court should have treated it as money spent to meet the parties' expenses. Bradley testified that he used the funds to pay prior years' debt, his temporary alimony and child support obligation, his son's car insurance, Bradley's life insurance policy, and to meet month-to-month living expenses. Bradley did not break down the different amounts spent nor did he provide documentation of the various expenditures. In *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000), the husband obtained a distribution of his retirement account, which he testified was used to pay bills, but he did not provide testimonial or documentary evidence as to the specific bills paid. The Nebraska Supreme Court stated that "[w]ithout substantiation by receipts, canceled checks, or other evidence, the testimony of that party that he or she spent or otherwise disposed of the assets is not sufficient to support such allegation." *Id.* at 667, 619 N.W.2d at 462. Thus, the Supreme Court determined that the trial court erred in not including the asset in the marital estate.

It is clear that Bradley had the exclusive use of the 2009 bonus, in addition to his regular salary, to meet expenses and that Lisa did not. At least a portion of the bonus was used to meet his own current expenses and not for joint expenses or Lisa's current expenses. Lisa was required to incur credit card debt and utilize the money in her savings account in order to meet her expenses during the period of separation. The record shows that in the past, the family relied upon Bradley's annual bonuses to meet monthly expenses throughout the year. Under these circumstances, we find no abuse of discretion in including the 2009 bonus as a marital asset in the division of the marital estate.

Treatment of Lisa's 2004 Suzuki.

Finally, Bradley argues that the district court failed to consider the 2004 Suzuki in its property division. During the separation, Lisa purchased a Suzuki for \$4,600. Lisa used funds from her savings account to pay for the vehicle. However, the Suzuki was not in good shape, so she traded it in for \$2,300 and leased a Toyota Camry. Lisa used some of that money to pay for the licensing of the leased vehicle and placed the rest back into the account prior to trial; however, there was no evidence about the specific amounts used for licensing or returned to the savings account. As such, there was no basis for the district court to segregate the funds, even had it wished to do so. Given that any such amount would have been de minimus in the division of the marital assets, we find no abuse of discretion by the district court in failing to include the money spent on the Suzuki in the marital estate. In reaching this conclusion, we are mindful that the district court determined that Lisa's savings account was a marital asset despite Lisa's request to treat it as her nonmarital property.

Attorney Fees.

Lisa challenges, on cross-appeal, the district court's failure to order Bradley to pay some or all of her attorney fees. In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Brunges, supra*. At trial, Lisa asked for an award of all or part of her attorney fees. Exhibits 34 and 35 are attorney fee affidavits for services rendered totaling \$21,151.50 and \$9,551, respectively. The district court declined to award attorney fees to either party.

An award of attorney fees depends on a variety of factors, including the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and general equities of the case. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

This case involved multiple contested issues, including the amount of child support, alimony, and property division, and trial was conducted over the course of 2 days spread out over 1½ years. Lisa received 50 percent of Bradley's retirement and investment accounts. She also received \$11,278 as a marital estate equalization payment. In addition, Lisa was awarded \$3,000 per month in alimony.

In our de novo review, we have considered the general equities of the case as well as the other relevant factors, and we cannot say that the district court abused its discretion in ordering the parties to each pay their own attorney fees.

CONCLUSION

The district court did not abuse its discretion in the award of child support, the determination of the parties' respective share of unreimbursed medical and childcare expenses, the award of alimony, the determination of and division of the marital estate, or in the failure to award attorney fees to Lisa. The provision regarding childcare expenses in the decree is modified as set forth above.

AFFIRMED AS MODIFIED.